Brief of Rae & Knapp for P. C. Co

Filed May 14, 1897.

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Supreme Court of the United States

OCTOBER TERM 1896

No. 673.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,

PLAINTIFF IN ERROR,

vs.

RICHARD P. THOMAS,

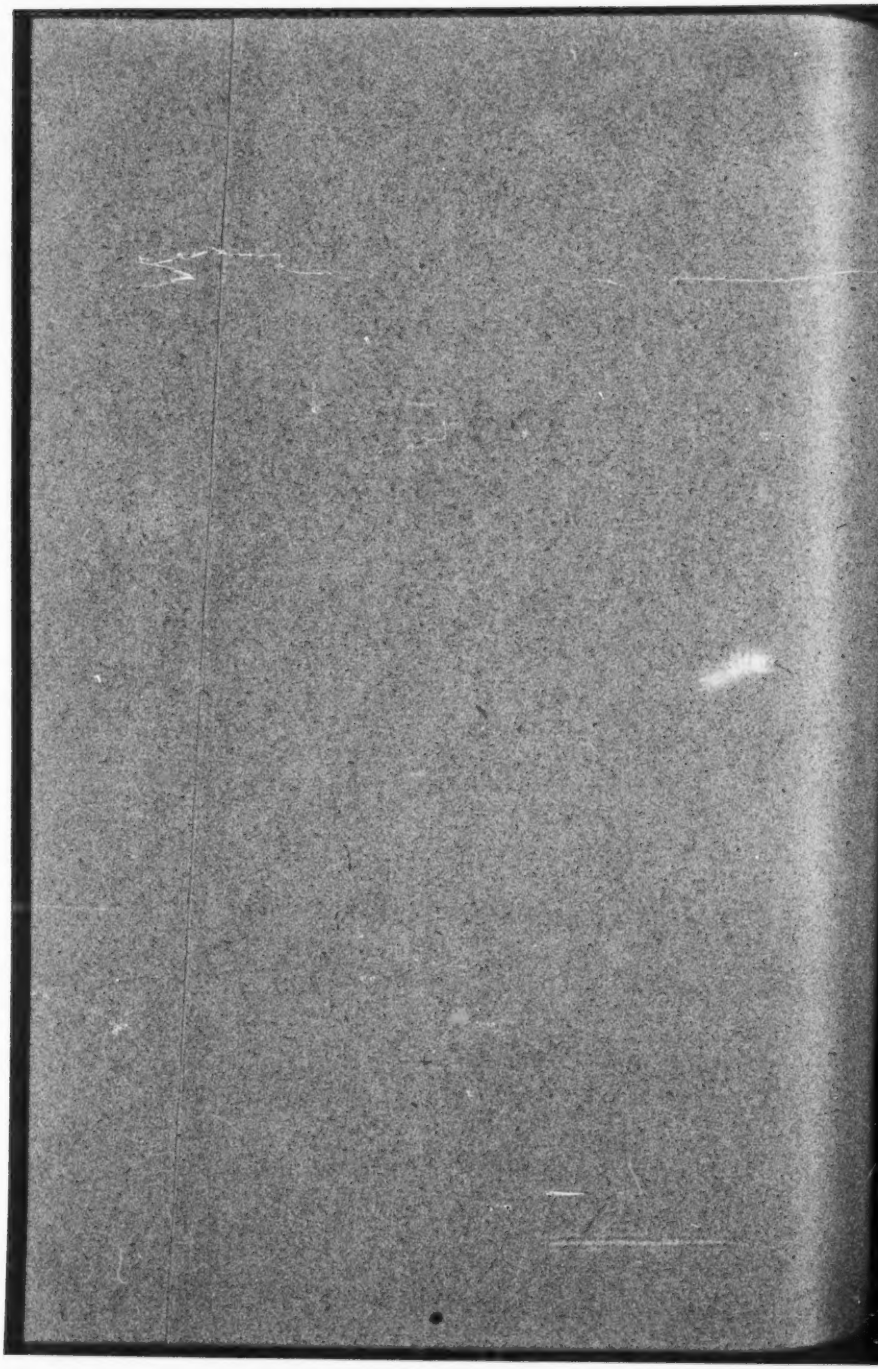
DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

FILED MAY ——— 1897.

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Counsel for Plaintiff in Error.



Supreme Court of the United States. October Term, 1896.
No. 673.

THE CALIFORNIA NATIONAL BANK, OF SAN FRANCISCO, Plaintiff in Error,

v.

R. P. THOMAS, ET AL., Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

This action was brought originally by a stockholder of the plaintiff in error, a National Bank, against three persons, its directors and officers, the corporation itself, and its receiver. The suit is brought by plaintiff, as a representative of the stockholders, and for the benefit of the Bank.

The complaint avers the organization of the Bank under the United States laws, the execution of articles of association, election of Directors, and adoption of a code of by-laws, in force ever since. It then sets out in full the provisions of the code of by-laws adopted by the Directors, which fix and define the duties of the officers, Executive Committee, and President and Vice-President. Section 17, defining the duties of the President, begins with these words:

"The President shall have general control and supervision "of all affairs of the Bank (Tr., p. 6)." It continues, (p. 7), "He shall perform all duties required of him by the Bank "Laws of the United States, or its proper officers," and concludes, "He shall also have supervision of all employes of the "Bank, and may suspend them when necessary, reporting his "action and occasion thereof to the Board of Directors at its "next meeting."

Section 7 provides for appointment of an executive committee, consisting of the President and two other directors, "who "shall have and exercise immediate supervision of all the "officers and business of the Bank, (p. 6)."

Having set up (p. 4) that the three defendants, Thomas, Thompson, and Wilson, were Directors at all times mentioned, the complaint continues (p. 8) to aver their appointment and election as the Executive Committee, that of the first named as President, and the last as Vice-President, in October, 1886, and their continuance in office, and "that (p. 10) upon their "said election and appointment as such officers said three "defendants severally and as such President, Vice-President, "and Executive Committee, duly accepted the positions of the "respective officers, and as provided in the above mentioned "code of by-laws, and uly accepted the trusts and obliga- "tions to perform each and all of the duties therein prescribed, "with due skill, care, attention, prudence, and fidelity."

(p. 12.) That well knowing each and all of the said facts above recited, and said three persons above named, defendants Thomas, Thompson, and Wilson, "severally being fully "aware of the nature of said trust, and the duties thereof, "accepted and retained the said trust, and unto the said cor- "poration promised faithfully to discharge the same, and "each and all of the said duties thereof in a proper, careful, "and judicious manner, and with due care, attention, skill, "prudence, diligence, and fidelity."

(p. 13.) That the Bank began business soon after, but that these defendants did not regard their aforesaid duties, nor their aforesaid promises, but wholly disregarded the same, and contriving together to injure and deceive the corporation, neglected and omitted, without excuse, to direct the business of the Bank, and negligently permitted the Cashier to control and manage the whole business.

Then follow allegations of various transactions, three of which are infractions of Section 5200, Rev. Stat., being each more than one-tenth of the Bank's capital, and not being secured drafts, or in good faith, or discounts of commercial paper by actual owners.

The losses by all these transactions are alleged to have amounted to $400,000.00, resulting in a destruction of surplus and capital, from which followed failure, receivership, and an assessment by the Comptroller of $75,000.00.

It is then stated that the Corporation, the Comptroller, and Receiver had each been requested, and each refused, to bring this suit on behalf of the Bank, and that the Bank and the Receiver are, therefore, parties defendant, because they would not come in as plaintiffs.

Then follows a prayer for an accounting, that the three defendants restore this $400,600 to the Bank, and be held jointly and severally liable, and for general relief.

The answer of Thompson and Wilson admits these by-laws, but sets up others (p. 48-49), which it is claimed relieved two of the defendants of some of their aforesaid duties as Directors and members of the Executive Committee, by placing certain duties on the Cashier. Defendant Thomas filed no answer, but adopted that of his co-defendants, making the question of his liability purely a legal question, and one of construction under said by-laws.

The cause was referred to a referee, as a cause in equity, the Court desiring further proof after trial and an order holding the defendants liable. His report (p. 63) is that three certain persons owed the Bank, at different dates, August 6, and December 15, 1888, upwards of $20,000, the limit under Section 5200.

Thereupon the two defendants, Thompson and Wilson, paid into Court $20,000.00 and $7,500.00 respectively, and were, with the consent of the Court, dismissed, and the action then proceeded against R. P. Thomas, the Bank and the Receiver as the only defendants.

The Court finds the by-laws set out in the complaint, the facts showing knowledge in the President of a report of an auditing committee, and of the condition of the Bank, and of the making of improper and unauthorized loans (pp. 80-81), and (p. 85) that "it appears from books, papers, and documents of said Bank, to which said President, defendant "R. P. Thomas, had full constant access," that the said three borrowers named in the complaint, referee's report, and decision, were respectively indebted to the Bank in the amounts stated at the dates given above, and that these were improper uses of the moneys of the Bank, which he could easily have prevented.

The total loss by these loans is found to have been $166,919.00, and after giving credit for the amount paid into Court, judgment is entered in favor of the plaintiff, for the use and benefit of the Bank, and against defendant Thomas for $139,419.00. The Bank did not complain of this, but Thomas appealed, and the Appellate Court decided, first, that the suit was not upon a cause of action *ex contractu*, but upon one purely in tort.

That the averments of the promise by defendants to dis-

charge their trust are unnecessary, and do not affect the cause of action. "That the law imposed upon them the duty "of using due care, when they agreed to discharge their duties "as members of the Executive Committee."

That for these wrongful acts defendants are liable in tort, and "the fact that there might be another cause of action "*ex contractu*, is a matter entirely apart."

The opinion then proceeds to discuss the findings, and holds that they show a several liability, if any, for breach of the duties of the President, and that the liability pleaded is for joint negligence of the three defendants as members of the Executive Committee. But the Court denies that any several liability as President, for breach of his duties as such, rested on defendant Thomas, either under or by virtue of said by-laws or contract pleaded, or at all. Indeed, in one part of its opinion the Court denies that any several liability is pleaded. The Court then go on to say that because the findings make out a case of several liability, while the case pleaded is one of joint liability, or none, the judgment must be reversed. But they further proceed to decide as a necessary corollary from the conclusion that there is no several liability upon defendant Thomas (the President), that the payments made by his co-defendants before judgment, and the dismissals as to them were a retraxit, which, it holds, is the equivalent of a release and satisfaction, where the suit is "against joint tort "feasors," and thereupon orders judgment reversed, and orders further that judgment be entered in the trial Court in favor of defendant Thomas and against plaintiff, finally ending the litigation.

The Bank and plaintiff sued out this writ of error, and we are met by a motion to dismiss.

POINTS IN THE CASE.

It plainly appears from the foregoing that whether the liability sought to be established in this action is to be called *ex contractu* or not, the suit and the recovery is for a breach of the duties imposed on the President by the by-laws of the Bank, and the Revised Statutes, the laws of the United States.

The plaintiff throughout, by the averments of his bill, by his

prayer for a joint and several judgment, by his consenting to a dismssal of two, and then moving for and taking a judgment against the third, did everything it was possible to do to base and predicate the claims of the corporation he asserted upon the contract of agency by-laws of the Bank, and the laws of the United States, independent of any common law lability, and to hold defendant Thomas liable severally as President, by reason of the by-law 17, in addition to and cumulative of the liability existing under or imposed by by-law 7 upon him as member of the Executive Committee.

It has been held by the Circuit Court of Appeals that where a cashier gives bond to the Bank, a suit on that bond involves a federal question, and is within the jurisdiction of the United States Circuit Court, becauses it raises a question as to the duties of the Bank's officers, even without a recital that he will faithfully perform the duties of his office, "according to "law and the by-laws of the Bank." That the cashier's duties are not to be defined by State Courts. Walker vs. Windsor Bank, 56 F. R., 76-80. The Acts of July 12th, 1882, Sec. 4, (22 St., 163), and of August 13th, 1888, (25 St., 434), do not place National Banks under any disadvantage in raising so called federal questions (same case), and Petri vs. Bank, 142 U. S., 650. And where, as here, plaintiff distinctly makes the claim to be entitled to enforce the duties of the Bank's officers according to the terms of the by-laws, the right to define the duties of the President to make those particular by-laws, and to claim the sanction of a liability arising by breach of each clause is in issue. The claim to hold the President liable under the by-laws (since they have no force or virtue apart from the laws of the United States) is a claim made under those laws. That being denied, as here, this Court has jurisdicton to re-examine the decree. The right to fix and define the supervisory powers of the President in the contract of agency itself is in issue, and that alone gives the Court jurisdiction. Osborn vs. Bank, 9 Wheat., 823-4, and the language of Justice Marshall in that case quoted in Pac. R. R. removal cases, 115 U. S., 1-13.:

"When a bank sues, the first question which presents itself "and which lies at the foundation of the cause is, Has this "legal entity a right to come, not into this Court particu-"larly, but into any Court? This depends on a law of the "United States.

"The next question is, Has this being a right to make this "particular contract? If this question is decided in the nega- "tive, the cause is determined against the plaintiff, and this "question, too, depends entirely upon a law of the United "States."

Throughout the claim is made that it is by reason of these special peculiar provisions of the by-laws that the defendants are liable. This of itself gave plaintiff a right to hold defendant Thomas severally liable under by-law seven, as well as jointly with the other defendants under Sec. 17, whether it be upon his contract to observe those duties or in tort for failure to do so.

Section 5136, Rev. Statutes, gives the bank the distinct right to "define the duties" of its President and other officers, and to regulate by its by-laws "the manner in which its gen- "eral business shall be conducted." This, plaintiff in error undertook to do, and this suit is an assertion of that right. The claim of the plaintiff to hold the President liable for the acts of the cashier is based upon the fact that he, the President, by the by-laws of the bank, had general supervision of the cashier, with power to suspend him, and general control of him and of the affairs of the bank. Apart from the provisions of these by-laws, to wit: by general law, it is very doubtful if the President, as President, would have any control over or responsibility for the acts of the cashier. Merchants vs. State Bank, 10 Wall., 604; Thompson on Corporations, 4619-20; Morawetz on Corporations, 537-8.

If duties were prescribed by a State Statute they must give way to Federal Statutes. Gulf etc., vs. Hefley, 158 U. S., 98-105; Davis vs. Elmira Savings Bank, 161 U. S., 275; McClellan vs. Chipman, 164 id., 347.

Where, then, the duties of its officers are defined by the bank under the authority of a Federal Statute, those duties are the ones the President must faithfully perform, independent of custom or the general law, which must yield to the terms of the positive enactment. This Statute and by-law fix the measure of the President's duties. That, at any rate, is the claim made and denied in the case at bar.

The State Court clearly denied plaintiff a recovery on the alleged liability of the President as such.

The sufficiency of the facts pleaded and relied on is a question arising under Federal law. Mitchell vs. Clark, 110 U. S., 633.

The Act of July 12, 1882, places National Banks, so far as jurisdiction is concerned, in the same position as State banks. But it is submitted that neither that Statute nor the later Act mentioned above deprive this Court of its appellate powers over decrees of State Courts, where a claim is made that brings the case within Sec. 709 of the Revised Statutes, which could not be made by a State bank, but which arises and is based on the laws of the United States, and depends upon the effect to be given to a Statute of the United States and to the by-laws and contracts of a National bank, made under and by express authority of such Statutes, ~~and is~~ independent and apart from general law or State legislation. Such a claim could not be set up or made by a State bank, save under a special Statute. This Statute gives this right to National banks.

It is for the Federal Courts to determine questions arising under Federal laws, and to interpret and give effect to them, and to the by-laws made and authority exercised under them. If not, then the duties of National bank officers may be defined by the State Courts, as they see fit to construe the law of negligence and the power of Directors of the bank expressly given by the Federal Statute is destroyed. (Walker vs. Windsor Bank, supra, distinguishing Whittemore vs. Bank.

And this Court has power to review a judgment deciding that a National bank had no power to make the contract sued upon. Logan Co. Bank vs. Townsend, 139 U. S., 67.

A defense of immunity from debts because of change from a State to a National bank raises a Federal question. M. Bank vs. Claggett, 141 U. S., 520.

National banks are instrumentalities of the United States Government, and as such necessarily subject to the paramount authority of the United States. Davis vs. Elmira National Bank, 161 U. S., 275; McClellan vs. Chipman, 164 U. S., 347.

This case holds that an attempt by a State to define their duties or powers of those given their officers under the laws of the United States frustrates the purposes of the National Legislature or impairs the efficiency of these agencies of the Federal Government.

The rule stated in this case is the cessation of the operation of State and general laws, whenever they conflict with the laws of the United States or frustrate the purposes for which the National banks were created, or impair their efficiency to discharge the duties imposed on them by the laws of the United States. (p. 357.)

The claim that the State had no right by its Legislature to define the duties of cashier of a National bank is a Federal question. This admits of no doubt. A defense in a State Court that the cashier of a National bank is amenable to no law but a law of Congress, and that a State Legislature has no power to prescribe his duties, raises a Federal question of which this Court has jurisdiction. Waite vs. Dowley, 94 U. S., 527.

The Supreme Court has jurisdiction to review a decision of a State Court that a bankrupt's discharge is no bar to an action. Dimmock vs. Revere Co., 117 U. S., 599.

So where the effect of a discharge in bankruptcy upon the right to enforce a lien is necessarily involved. Long vs. Bullard, 117 U. S., 617.

It may be conceded that if the duties of the President and his liability were exactly the same at common law as under the Statute, and the by-laws, that the law as the Court say in its opinion which imposes a duty, is a doctrine of general jurisprudence, though it is not clear that it is not the Federal Statute itself; but where, as here, the duties, responsibilities and liabilities, as fixed and defined by the bank, are greater and other than those of a President under general law, independent of usage, the plaintiffs may surely claim under United States laws to hold the President to that stricter accountability created under and by those laws.

In Mays vs. Fritton, No. 533, 131 U. S., CXIV, it is said briefly and pointedly:

"The claim set up in the State Court being founded on the "bankruptcy Act, and the decision being adverse, the case is "within the very words of the Judiciary Act of February 5, "1867, giving this Court jurisdiction." The same rule, it is submitted, applies in the present case.

Where the decision of the State Court was against the right claimed by defendent under Act of Congress in relation to stamping deeds, making them inadmissible in evidence, the question, however frivolous, is one of which this Court has jurisdiction. Hall vs. Jordan, 15 Wall., 393.

Where decision is against an authority set up under an Act of Congress, this Court has jurisdiction. McGuire vs. Mass., 3 Wall., 387.

The Appellate Court denied the bank's right to make any contract of agency. It is said in Morawetz on Corporations, Section 550, liability of directors:

"If an agent is guilty of an unauthorized act * * * the "latter may hold the agent responsible, both for the tort and "for the breach of the contract of agency.

"An agent may likewise be liable in equity."

But the Supreme Court, in case at bar, say the contract pleaded is a thing apart, and does not affect the cause of action. Where a written opinion, stating the grounds of the decision, is required by State law (as in California), this Court will examine such opinion to see whether any Federal question is involved. Constitution, Article 2, Sec. VI; Gross vs. U. S. M. Co., 108 U. S., 477.

We submit that these allegations of the by-laws and the contract of agency are the foundation of the bank's right of action, and its claim to hold defendant Thomas severally liable for the whole loss, and that being denied, this Court can review the decree.

The action takes its character from the pleadings, and on the same facts may be in contract or tort as the pleader determines, even under the California practice. Stark vs. Wellman, 96 Cal., 400.

It may be unimportant on this motion whether the action sounds in tort or contract, but as the claim to hold the President liable and the several judgment given against him is based upon a liability imposed under and by virtue of Section 5136, which liability, as well as recovery, were both denied, the decision being adverse to the claims made under the United States laws, this Court has jurisdiction to review the same. Woodruff vs. Miss., 162 U. S., 292; Mays vs. Fritton, 131 U. S., CXIV.

The charges in the bill, it is submitted, in addition to the foregoing, make out a case against the directors of several liability under Sections 5204 and 5239, Revised Statutes, which has been held to attach without the suit by the Comptroller to forfeit the franchise. Stephens vs. Overstoltz, 43 F. R., 771.

And the claim being made that defendant Thomas is severally liable for the whole loss, and denied by the State Court, this Court has jurisdiction to re-examine the judgment. The three loans in excess of one-tenth of the bank's capital are each particularly the last one, violations of the Statute; the referee's report and the Court's decision make it clear that they were mere loans on personal indebtedness of the individuals, and neither bona fide discounts of secured drafts nor purchases of commercial paper from actual owners. This would subject

Thomas to the several liability claimed and enforced by the trial Court, but denied by the Appellate Court; and this denial gives this Court jurisdiction of the writ of error, even though it might hold the judgment proper on this ground by reason of failure to allege a prior suit by the Comptroller forfeiting the bank's franchise. Bailey vs. Mosher, 63 F. R., 488.

Further, the bank and plaintiff claimed also the right to maintain this as a suit in equity against its three unfaithful trustees. The general right to sue in equity is given by Section 5136. The right to sue in equity in this particular case exists, perhaps, independent of Statute, and the corporation may sometimes elect to sue at law or in equity. Charitable Co. vs. Sutton, 2 Atkins, 401; Brinkerhoff vs. Bostwick, 88 N. Y., 52; quoted 99 N. Y., 193, and S. C., 105 N. Y., 572, distinguishing Hun vs. Cary, cited in opinions in the record; Horn S. M. Co. vs. Ryan, 42 Minn., 196; Ackerman vs. Halsey, 37 N. J. Eq., 356; Trustees vs. Bossieux, 3 F. R., 818; Witters vs. Lowles, 31 F. R., 43 id., 405.

Each case must depend on its special facts and circumstances. Briggs vs. Spalding, 141 U. S., 132. Here it is submitted that we had a right to elect to sue at law or in equity, and having elected to frame a complaint for an accounting, an equitable proceeding, we had a right under Section 5136 to maintain that suit as fully as a natural person, and so avoid the applications made of the harsh and technical common law principles of retraxit, etc., etc., and this claim being denied by the Court's decision that the cause of action is purely legal, when it is plainly equitable at the bank's election, gives this Court jurisdiction over the writ.

Whether the last two points are or are not well taken, this same liability to make good the whole loss attaches, and the right to recover of Thomas, after dismissing as to the others, exists by virtue of the facts showing a separate duty imposed on the President as such, as those duties are defined in the by-laws under authority of the Statute. The decision necessarily denies this claim of the corporation, thereby denying all force and validity to those by-laws, and denying the validity of the Statute which authorizes the bank by its Board of Directors to define the duties of the President of the bank.

We think this gives a right to the writ of error which can not be taken away by any construction of the Acts limiting the jurisdiction of the Federal Courts in cases of National banks.

Further, those Acts distinctly save the jurisdiction in suits

between such banks and officers of the United States, and suits for winding up the affairs of a National bank.

The receiver is such officer (ex parte Chetwood), and he is a party and a necessary party to this suit. The trustees defendant are entitled to have all possible claims against them settled in one suit. Hand vs. N. Bank, 55 How. Pr., 231.

This suit is not brought strictly by direction of the Comptroller, or of the Receiver, but it is to enforce a right of action resting in the Receiver primarily, it has been held. And a controversy appears at once to have arisen as to the right to control the cause of action and the proceedings, which would make it a suit between the receiver on one side and the bank on the other. In this case, by the payment of this fund of $27,500.00 into Court and recovery of the judgment, the suit became at once one between the corporation and the receiver and later his successor, the agent, a contest as to which party should control the action and enforce the judgment, the plaintiff and the corporation and its directors, or the receiver and the agent claiming to be his successor.

The meaning of the word between is not clear (Petri vs. Bank, supra, 142 U. S., 650), but it is submitted that the case at bar is a suit between the bank and the receiver within the saving clause of the Statute.

We respectfully submit that a Federal question was and is clearly involved in the determination of the case..

II.

Was that right claimed by the bank specially set up in the State Court?

The right to recover on the duties defined in the by-laws was set up and claimed *ex industria*—the facts showing the liability of the directors by reason of their violations of the Statute, as well as infractions of the by-laws certainly were set up.

The prayer of the bill claimed a right to hold them to account as such directors, and to have a joint and several judgment against them, and by dismssal of the action as against all, save one, this became a prayer for a several judgment against him.

The cases do not hold as defendant in error would seem in his brief to claim that the plaintiff in error must specify the

Statutes on which he bases his right, in order to give this Court jurisdiction.

As was said by the Honorable Chief Justice Fuller in the opinion in Woodruff vs. Mississippi, 162 U. S., 292-298:

"If, by the adjudication (of the State Court) a right pos-
"sessed by the plaintiffs in error as bondholders (here as a
"National bank), under the Constitution and laws of the
"United States was necessarily denied, then this Court has
"jurisdiction to review the judgment on writ of error."

If the Supreme Court can see by an examination of the record that the Federal question was raised and decided adversely to plaintiff in error, it is not necessary that it be set up in pleadings, or offer, or an objection to evidence. Furman vs. Nicoll, 8 Wall., 44; Crowell vs. Randall, 10 Pet., 368; Armstrong vs. Treas., 16 Pet., 281; Beer Co. vs. Mass., 97 U. S., 25.

If the pleadings make out a case that comes under the United States Constitution or laws, that is enough. It is unnecessary to set out the provisions of law relied on. Bridge Props. vs. Hoboken, 1 Wall., 116; Furman vs. Nicholl, 8 Wall., 44.

It is not always necessary that the Federal question should appear affirmatively on the record or in the opinion to give jurisdiction, if an adjudication of such question was necessarily involved. Kaukauna W. Co. vs. Green Bay Co., 142 U. S., 254.

Where the State Court did not in terms pass upon the claim distinctly made there, but the final judgment necessarily involved an adjudication of that claim, this Court has jurisdiction to review the case. Chicago Co. vs. Needles, 113 U. S., 574.

The question need not have been formally raised, but it is sufficient if it appears by clear and necessary intendment that a Federal question was raised and presented to the State Court. Crowell vs. Randall, 10 Pet., 368; Armstrong vs. Athens Co., 16 Pet., 281; Hickie vs. Starkie, 1 Pet., 94; Bridge Props. vs. Hoboken Co., 1 Wall., 143; Furman vs. Nicoll, 8 Wall., 44; Murray vs. Charlestown, 96 U. S., 442; Detroit Ry. Co. vs. Guthard, 114 U. S., 136; Eureka Lake Co. vs. Yuba Co., 116 U. S., 410.

Where the decision of a Federal question is necessarily involved the Supreme Court has jurisdiction, although no mention is made of the Federal question in the opinion. Arrowsmith vs. Harmoning, 118 U. S., 194.

It decides a Federal question by affirming a decision of the

Court below on a petition for review, setting forth the decision of such lower Court. Stewart vs. Kahn, 11 Wall., 493.

When a decision of the Federal question is necessary to any final judgment in the case, or no non-federal question is decided by the State Court broad enough to sustain the judgment, it will be reversed if error is found. Murdock vs. Memphis, 20 Wall., 636; Minnesota vs. Batchelder, 1 Wall., 109.

Where the record shows no other reason why the State Court sustained a demurrer to the plea of tender than that it was made in United States legal tender notes, this Court has jurisdiction to review the judgment. Dooley vs. Smith, 13 Wall., 604; affirmed legal tender cases, 110 U. S., 438.

Where the claim is made for the first time upon error in the highest Court, and the Court's decision is merely that the errors assigned have been examined and understood, this was deciding against the privilege claimed under an Act of Congress. Davis vs. Packard, 6 Pet., 41.

In the case at bar, therefore, it was surely unnecessary to do more than was done to raise Federal question. We respectfully submit that a Federal question clearly appears, and that the claim, based on the United States Statute, is specially set up and claimed in the proper way by the proper party at the proper time.

III.

But the defendant in error contends that even if there be a Federal question that the decision of the State Court was based on another ground.

This is not the case. The other grounds of objection to the judgment of the trial Court were none of them broad enough to warrant anything more than a mere reversal of the judgment. The opinion so states in express words. The judgment and decision directing the trial Court to enter up final judgment on the record against plaintiff and plaintiffs in error, without which the judgment would not be final, is based solely upon the ground stated, to wit: that which denies any several liability whatever in defendant Thomas.

Had the Court recognized liability resting on the defendant by virtue of by-law 7, the case might have been reversed for the assumed error that the findings depart from the strict case made in the bill; but it would have been impossible, under the California practice, to enter up judgment on the findings against the claim made by the plaintiff under United States law.

That question arises on the record by reason of the statement of the President's duties under the by-laws and his agreement to perform them, pleaded in the bill, admitted by the answer of defendant, and found by the trial Court.

The last ground of the decision, viz.: that the payment made by his co-defendants released defendant Thomas, is based by the Court itself upon the assumed fact that no several, other, or different liability rested on him from that imposed by law upon the others.

That is precisely the point involved and raised and depending upon a construction of the by-laws and the right of the bank to define the duties of its President, and to impose other and greater responsibilities upon him than either custom, local or State laws may warrant, a right valuable to the bank, as it gave the power to withdraw the President's duties from the hazy and uncertain domain of customary or local law, and to fix and define, make certain and definite, clear and plain, his powers and his duties, by positive enactment and contract.

It gave the bank power to define its President's powers in anyway it saw fit, and here the claim is made that this was done in the by-laws and by the contract of agency upon which the pleader declared, and that contract of the President, as President, was several, his duties as such separate and distinct and other than and cumulative upon the duties imposed on the executive committee and his liability as President, distinct from that of the other members of the committee, and not simply a joint or joint and several liability, resting equally on them and him.

If there is a Federal question at all in the case, if the bank's claim to hold its President liable as such is one made under the laws of the United States, and that it seems is so under broad principles, Osborn vs. Bank, and Woodruff vs. Miss., then the decision in this case necessarily involved that Federal question; for the assumed doctrines of retraxit, etc., etc., are applied by the Court solely because it had decided the defendants were joint tort feasors, and that there was no liability whatever on the President as such.

The plaintiff pleaded this claim, the trial Court found in favor of it, and based its decree thereon. Its first order (p. 59) mentions no amount nor amounts, and despite such order the suit having proceeded in all respects as a suit in equity in that Court, it was competent for it to assess damages in different amounts, or, if it saw fit to approve a compromise in whole

or in part, the money being paid in, subject to its own orders. Leeds Est. Co. vs. Shepherd L. R., 36 Ch. D., 787-807.

Even the referee's report was merely advisory. Sweetsen vs. Dobbins, 65 Cal., 529.

The other questions of practice were not, under California procedure, broad enough to warrant the judgment rendered. The Court was not content to order a simple reversal of the judgment, but ordered a judgment against plaintiff, whereby he and the corporation would take nothing by the action.

A mere reversal of a judgment by the Supreme Court has the effect to remand the cause for a new trial. Falkner vs. Hendy, 107 Cal., 49.

Where findings are insufficient to support the judgment, or contrary to the evidence, the Appellate Court cannot supply findings, but will reverse the judgment and remand the cause for a new trial. Russell vs. McDowell, 83 Cal., 70; Smith vs. Los Ang. etc. Co., 78 Cal., 289.

To do otherwise would be to exercise original, not appellate jurisdiction, which the Appellate Court cannot do. Ellis vs. Jeans, 26 Cal., 272; Board of Ed. vs. Martin, 92 Cal., 209.

It would seem hardly necessary to cite authorities on this point where the Court, as here, so plainly rest that portion of their judgment, which alone makes it a final judgment upon the objection stated to be more serious than those which would necessitate a mere reversal.

When, in a suit from a State Court, there is a Federal question, and it does not appear upon which of the two grounds the judgment was based, then, if the independent ground was not a good and valid one, or not of itself sufficient to sustain the judgment, the Supreme Court of the United States will take jurisdiction of the case. Johnson vs. Risk, 137 U. S., 300.

If the Federal question controls the whole case, or there has been no decision by the State Court of any other matter sufficient to sustain the judgment, then this Court has jurisdiction and will reverse the judgment. Murdock vs. Memphis, 20 Wall., 590.

The language of the opinion when passing from the points made on the findings to the final point that, because Thomas was not severally liable, but a joint tort feasor, he could go scot free, is as follows:

"But while this error would necessitate a reversal, there is "yet a more serious objection to be considered."

This more serious objection is stated to be that because

Thomas was a joint tort feasor simply, not liable as President at all, but liable with his co-defendants, and not otherwise, that therefore the common law doctrine of retraxit operated to relieve and release him under the proceedings in this cause.

This conclusion that his debt was paid, his default made good by the partial payment his co-defendants made, the Court distinctly, plainly and repeatedly throughout the whole opinion bases upon the denial of any several liability or separate responsibility resting on Thomas, the President, as president.

The former is made to depend upon the latter, and if, as we believe, the Court must decide, the former involves a Federal question, so likewise must the latter.

The Board claimed a right to hold its President severally liable to it, because of its power to prescribe and define his duties, to make the contract of agency with him and hold him accountable for breaches of that contract, because of its power to make by-laws, and to prescribe the manner in which its general business should be conducted and its privileges exercised; all this under United States laws.

The Court say, in effect, the bank has no such rights. The duties of National bank officers are independent of the by-laws defining their powers, independent of the bank's contracts with them—all matters of pure tort depending solely upon (general) law, and under such law, as we apply it, the bank's President was not severally liable to you, the bank, as you claim. Your by-laws, your contract with him, did not make him so, or, to use the Court's own language, defining defendant's liability:

"Their failure to use due care was a wrong, a tort, pure and "simple," and the averments.

"That defendants promised faithfully to discharge their "trust with due care and attention," etc., are unnecessary, and do not affect "the cause of action." This is the decision. But the bank has a right to sue on this contract if it was made. Jones vs. Str. Cortez, 17 Cal., 487.

This and the by-laws were pleaded as the foundation of plaintiff's action, and the Court, having undertaken to end the litigation and end forever the bank's claim against its President, on account of the acts charged, necessarily by its judgment that the facts pleaded, proven and found show no several liability, denied the bank's claim to the right to make its President's liability other or different from that of a corporation without any by-laws on the subject, or without the

power given National banks by their charter, so to define the power given National banks by their charters, so to define the powers of its officers.

It can not be said that the decision in this cause rests on principles of general or local law, since the Court, to make those assumed principles applicable, had to reject the claim made by the plaintiff and the Bank under the Revised Statutes, that the President was liable severally as President.

This was the case on which the recovery was rested. The opinion of the Supreme Court admits this (top par., p. 44), but it goes on to say, this is not the case made by the pleadings. Had the Court seen fit to stop here and simply reverse the cause on this question of practice, it would have gone back for a new trial; this judgment would not have been final; no Federal question would have been presented. But it did not stop here. It went on to a final judgment in that Court, which, if it stands, puts an end, not simply to the liability of Thomas as Director, as member of the Executive Committee, but as President as well.

This brought the case within the jurisdiction of this Court, since it is clear that both the several and the joint obligation of the defendant Thomas are pleaded, specially set up and claimed, and the right to hold him severally asserted under Federal Statute, both in the complaint and in the findings of the trial Court, where the issue is simply narrowed by leaving out the joint case made against the three. The pleadings and the judgment may both be consulted to determine the existence of a Federal question. (Craig vs. Mo., 4 Pet., 410).

The Bank in the case at bar is not strictly *sui juris*, a receiver having been appointed. Case No. 674, October term, 1896, brings up another branch of the same cause by a separate writ of error, wherein the contest arising between the Bank and the receiver is continued by the agent claiming his election as successor to the receiver, under the Act of Congress, June 30th, 1876. That this suit is one within the saving clause of the Act of July 12th, 1882, perhaps more clearly appears from that record.

Not only does it appear to be a suit between the Bank and the receiver, but it may well be held to come within the other clause of the Statute which saves jurisdiction in suits to wind up the affairs of a National Bank. It is not a suit to forfeit the franchise—that to an insolvent corporation is of no value, perhaps. But it is a proceeding in equity in which the direc-

tors and officers, as trustees, are called upon to account for their breaches of trust. They are entitled to have all claims against them settled in this suit. (Hand vs. Bank, supra).

And while it does not, perhaps, involve the proper distribution of assets in the receiver's hands; the Court does possess power, under broad principles of equity, to proceed to a decree that shall settle all matters affecting the Bank, its officers, and stockholders, not committed to the exclusive jurisdiction of the Federal Courts.

Having funds in its hands for distribution, it has power to distribute these direct to the stockholders, where the facts warrant such proceeding, and for that purpose may appoint its own receiver to collect the judgment. Fox vs. Hale & Norcross Co., 108, Cal., 475. What power it has over the agent, claiming his election under the stockholders, will depend on the agent's character.

If it should be held that he, too, is an United States officer, then is the jurisdiction of the Federal Courts saved for two reasons—both because the suit is between the Bank and an officer or agent of the United States, and because it is to wind up the Bank's affairs within the meaning of the Act of July 12th, 1882. In such case the claim of the Bank that its cause of action is equitable, and that in this proceeding it is entitled to an immunity from such technical and strictly common law doctrines as those applied herein, are claims arising under the general power given the Bank to sue in equity, which, in such cases being denied the Bank in case at bar, this Court has jurisdiction of the writ of error.

Both branches of the suit are by the writs of error removed to this Court. (Ex parte Chetwood, No. 7, original vol. 17, Sup. Ct. Rep., 385).

The questions arising on that record affect mainly the administration of the fund paid into Court in the suit in the trial Court, and motions to dismiss are noticed in both for the same day.

We believe a Federal question appears in each record, that the State Courts will not be allowed to define—as they have sought here to do—the duties of the President of a National Bank, according to a standard other than that provided by the Statutes of the United States. That this Court has, and is, given jurisdiction for the purpose of preventing the total destruction of the power given National Banks in their charters to define and make clear the duties of its officers.

That that salutary power will not be taken from these Banks by the decision of this Court that it has no jurisdiction to review the judgment of the State Courts in this cause.

The President of this Bank was held on the trial responsible to it in a sum now amounting, principal and interest, to nearly $200,000.00.

After a protracted trial judgment is entered against him for what the Court considered his just share of the loss suffered by the Bank.

The Appellate Court, on the merest technicality—one rejected by this Court in an early ruling, never since challenged, (Minor vs. Mechanics' Bank, 1 Pet., 46-79)—adjudges him released.

But to apply that technical and obsolete principle of retraxit (I. Van Vleet Former Adjud., p. 173) it was first necessary to hold that the President, as such, was not and could not be under any several liability, despite the Bank's by-laws, its contract with its agent, and the Revised Statutes. In so doing the State Court invaded the domain of Federal law. Thereby it gave this Court power and jurisdiction to prevent what would otherwise remain a miscarriage of justice and misapplication of legal principles, without remedy.

We respectfully submit that the motion to dismiss, for want of jurisdiction, should be denied.

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E. G. KNAPP,
Counsel for Plaintiffs in Error.

May 4th, 1897.